STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff/Appellee,

Supreme Court No. 147675
Court of Appeals No. 309245
Circuit Court File No. 10-018981-FH

GORDON BENJAMIN WILDING
Defendant/Appellant.
_____/

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PLAINTIFF/APPELLEE'S

BRIEF OPPOSING APPLICATION FOR LEAVE TO APPEAL

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Counter-Statement of Basis of Jurisdiction

Plaintiff-Appellee accepts Defendant-Appellant's Statement of Basis of Jurisdiction.

Counter-Statements of Questions Presented

I. The sentencing court has discretion in determining the number of points provided there is evidence on the record that adequately supports a particular score. Where "[s]coring decisions for which there is any evidence in support will be upheld[,]" did information contained in the presentence report and victim's impact statement adequately support the scoring of the offense variables now challenged by defendant?

Defendant-Appellant Answers: "No."

Plaintiff-Appellee Answers: "Yes."

Trial Court Answers: "Yes."

II. Ripeness prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." Where enforcement efforts have not yet commenced and defendant has not yet sought to avail himself of the protections provided by the statute, is defendant's claim premature, i.e., not ripe for adjudication?

Defendant-Appellant Answers: "No."

Plaintiff-Appellee Answers: "Yes."

Trial Court Answers: "Yes."

III. Had defendant engaged in an objection to offense variables, as he now does, that tactic would have shifted the focus of the sentencing away from the reasons the court should grant defendant YTA status to the aggravated factors that were scored in the guidelines. As in *Johnson*, as an objective matter, defense counsel could have easily concluded that such a course of action would be counterproductive. Can Defendant overcome the presumption of trial strategy?

Defendant-Appellant Answers: "Yes."

Plaintiff-Appellee Answers: "No."

Trial Court Answers: "No."

Counter-Statement of Facts

Defendant Gordon Benjamin Wilding pled guilty to third-degree criminal sexual conduct on June 11, 2010,[1] and he was placed on youthful trainee status on August 5, 2010.[2] After pleading guilty to a probation violation on August 11, 2011,[3] the court revoked defendant's youthful trainee status and sentenced him on September 1, 2011, to serve 85 months to 15 years in prison.[4]

The Court of Appeals denied defendant's delayed application for leave to appeal "for lack of merit in the grounds presented" in an order issued June 1, 2012.[5] In lieu of granting leave to appeal, the Michigan Supreme Court, on February 6, 2013, ordered this case remanded to the Court of Appeals for consideration as on leave granted.[6]

The Court of Appeals received briefs and heard oral arguments from the parties, and the panel held: "Because defendant is not entitled to resentencing based on the scoring of the offense variables (OVs), he waived appellate review of his challenge to the majority of the costs and fees assessed against him and his remaining challenge to court costs lacks merit, and he was not denied the effective assistance of counsel, we affirm."[7]

Additional facts will be included in the argument portions of this brief.

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[1] Plea transcript, referred to as Pt-, pp 4, 7-8.
[2] Sentencing transcript, referred to as St-, pp 6-8.
[3] Probation Violation Plea transcript, referred to as PVPt-, pp 5-8.
[4] Probation Revocation Sentencing transcript, referred to as PRSt-, p 8.
[5] *People v Gordon Benjamin Wilding*, unpublished order of the Court of Appeals issued June 1, 2012 (Docket No. 10-018981-FH).
[6] *People v Gordon Benjamin Wilding*, unpublished order of the Supreme Court issued February 6, 2013 (Docket No. 145530).
[7] *People v Gordon Benjamin Wilding*, unpublished per curiam opinion of the Court of Appeals issued July 16, 2013 (Docket No. 309245), attached as **Exhibit A,** Slip Op, p 1.

Argument

The sentencing court has discretion in determining the number of points provided there is evidence on the record that adequately supports a particular score. Where "[s]coring decisions for which there is any evidence in support will be upheld[,]" information contained in the presentence report and victim's impact statement adequately supported the scoring of the five offense variables now challenged by defendant. This Court should affirm the defendant's sentence.

Standard of Review: The scoring of the sentencing guidelines variables is determined by reference to the record, using the preponderance of the evidence standard.[8] "[T]his Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score."[9]

Issue Preservation: At both the original sentencing and again at the probation violation sentencing, each of defendant's attorneys specifically stated that there were no objections to the scoring of the guidelines.[10] Arguably, defendant did not merely forfeit review of this issue, he waived it and there is no "error" to review. As the Michigan Supreme Court held in *People v Carter*, where a party expressly approves an action, "[t]his constitutes a waiver that *extinguishes* any error."[11] Defendant's consent could not

[8] *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).
[9] *People v Waclawski*, 286 Mich App 634, 680; 780 NW2d 321 (2009) (citation omitted).
[10] St-5; PRSt-3-4.
[11] *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000) (emphasis in original); *See also People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001).

have been any clearer. Thus, there is no "error" to review.[12] Alternatively, defendant preserved the issues by raising them in a motion for resentencing.[13]

Analysis: The sentencing court has discretion in determining the number of points to be scored provided there is evidence on the record that adequately supports a particular score.[14] The Michigan Court of Appeals has held that: "Scoring decisions for which there is any evidence in support will be upheld."[15] If the minimum sentence imposed is within the guidelines range, this Court must affirm and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on in determining the defendant's sentence.[16] An error in scoring the sentencing guidelines that does not affect the total OV score enough to change the applicable sentencing guidelines' range is harmless.[17] On appeal, the defendant challenges the guidelines scoring for five Offense Variables, including OVs 3, 4, 8, 9 and 10.

1. Offense Variable 3.

Ten points was scored for offense variable three, reflecting that bodily injury requiring medical treatment occurred to the victim.[12] According to the presentence report,[18] and confirmed by the victim's medical records attached to Defendant's motion,

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[12] *Carter, supra* at 219. "Deviation from a legal rule is error unless the rule has been waived." *United States v Olano*, 507 US 725, 732-733; 113 S Ct 1770; 123 L Ed 2d 508 (1993) *quoted by Riley, supra.*

[13] MCR 6.429(C).

[14] *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002).

[15] *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

[16] MCL 769.34(10), *People v Babcock,* 469 Mich 247, 261; 666 NW2d 231 (2003).

[17] *People v Johnson,* 202 Mich app 281, 290; 508 NW2d 509 (1994).

[12] MCL 777.33.

[18] In *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (1993), the Court of Appeals, citing *People v Harris*, 190 Mich App 652; 476 NW2d 767 (1991) and *People v Walker*, 428 Mich 261; 407 NW2d 367 (1987), held that a sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited

the victim reported drinking something after which she felt very disoriented and then blacked out. The victim impact statement prepared by the victim's mother reported bruising between the victims' legs and the medical records state that the victim "woke today with pain, swelling and bruising of labia and vagina." The report further indicates a complaint of "groin pain." Moreover, the reports further indicated that the victim was prescribed a number of medications. Being potentially poisoned, which resulted in disorientation and blacking out, is an injury requiring medical treatment, i.e., "physical damage to a person's body"[13] that requires seeing a doctor. In addition, suffering bruising resulting from a sexual assault that also required the administration of drugs is clearly "unwanted physically damaging consequence[s]"[14] of defendant's crime. Thus, not only did *some* evidence support the scoring, trial counsel would have been justified in that he would lose a scoring objection and in making the tactical decision not to object and litigate the issue.

Defendant erroneously claims: "Something more than just the sexual act supporting a CSC conviction must be shown to establish a 'bodily injury,' and in this case that burden has not been carried by the prosecution."[19] As our Supreme Court has held, the scoring of the sentencing guidelines variables is determined by reference to the

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to, the contents of a pre-sentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial. The contents of the pre-sentence report are presumptively accurate if unchallenged by the defendant. *Id.* Neither defendant nor defense counsel had any additions, corrections or deletions to make to the presentence report at defendant's original sentencing. St-5-6. At his probation revocation sentencing, the only correction was to the defendant's age. PRSt-3-4, 6-7.

[13] *People v Cathey*, 261 Mich App 506, 514; 681 NW2d 661 (2004).

[14] *People v McDonald*, 293 Mich App 292, 298; 811 NW2d 507 (2011).

[19] Defendant-Appellant's Brief on Appeal, p 9.

record, using the preponderance of the evidence standard.[20] Where the prosecutor's burden was preponderance, the evidence supported scoring this offense variable.

2. Offense Variable 4.

Ten points were scored for offense variable four based on the victim suffering psychological injury requiring treatment.[15] Although Defendant references and attaches a part of the victim impact statement submitted by the victim's mother, he did not attach the impact statement of the actual victim, in which she explains how she suffers from nightmares, has flashbacks, can no longer "look at people with blue eyes without having flashbacks" as well as how she has suffered a "deffinate [sic] personality change" and that she has been going to therapy and receiving psychological counseling.[16] These circumstances overwhelmingly support the scoring of 10 points for OV 4.[17] Thus, not only did *some* evidence support the scoring, trial counsel would have been justified in that he would lose a scoring objection and in making the tactical decision not to object and litigate the issue.

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[20] *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008).
[15] MCL 777.34.
[16] The Victim Impact Statement is attached as **Exhibit B**.
[17] *See, e.g., People v Ericksen*, 288 Mich App 192, 202-203; 793 NW2d 120 (2010)(OV 4 was properly scored at 10 points where the presentence report indicated that the victim suffered from depression and that his personality had changed as a result of continuing poor health resulting from the crime); *People v Davenport (After Remand)*, 286 Mich App 191, 200; 779 NW2d 257 (2009)(the victim's expression of fearfulness is enough to support a score of 10 points under OV 4); *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004)(scoring of OV 4 was proper where the victim was fearful during her encounter with the defendant); *People v Drohan*, 264 Mich App 77, 90; 689 NW2d 750 (2004) (evidence of the victim's disrupted life, nightmares, and plans to seek treatment supported a score of 10 points under OV 4).

Defendant now argues ". . . her mother also stated that she was seeing a psychiatrist before the incident occurred."[21] This makes what happened to Amanda even worse because defendant assaulted a person who had pre-existing mental health issues, which rape could only exacerbate. Following the "logic" of defendant's argument, a rapist could assault a person with existing mental health issues, and never be scored under this Offense Variable because ". . . there is no way to know exactly what injury was caused by the event, and what had unrelated causes."[22]

3. Offense Variable 8

Fifteen points was scored for offense variable eight for moving the victim to a place or situation of greater danger.[18] "Asportation" means movement of a victim beyond that which is incidental to the commission of the crime.[19] The offender need not use force to accomplish the asportation.[20]

In this case, according to the presentence report, the victim met defendant and his friend at a dance and defendant indicated they had water to drink out in their van. She consumed the water, which neither defendant nor his friend did, and then she felt dizzy and disoriented. The victim later returned with defendant to that van and was again given something to drink, which again neither defendant nor his friend drank. The victim reported becoming disoriented and didn't know what was going on or how she got into the back of the van, where she was sexually assaulted.

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[21] Defendant-Appellant's Brief on Appeal After Remand, p 12.
[22] Defendant-Appellant's Brief on Appeal After Remand, p 12.
[18] MCL 777.38.
[19] *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003).
[20] *Spanke*, *supra* at 648 (scoring was proper even if victims were moved voluntarily); *People v Cox*, 268 Mich App 440, 454-455; 709 NW2d 152 (2005) (assaults occurred at the defendant's house); *Apgar*, *supra* at 323-324, 330-331 (OV 8 properly scored where victim went willingly with the defendant and was transported to an unfamiliar house).

These facts demonstrate that defendant moved the victim, albeit willingly, from a public dance into a private van in a parking lot. Common sense tells us that inside a van is a place of greater danger than a public dance at a school. This is analogous to *People v Steele*, where the scoring of 15 points was affirmed for placing victims in a place of greater danger where the CSC defendant took one young victim to a trailer on his property, another riding on a dirt bike far from the house, and another on a tree stand where others were less likely to see him.[21] The scoring in this case was proper and counsel was not ineffective for failing to challenge it. Thus, not only did *some* evidence support the scoring, trial counsel would have been justified in that he would lose a scoring objection and in making the tactical decision not to object and litigate the issue.

4. Offense Variable 9.

Ten points were scored for two persons being placed at risk of physical injury under offense variable nine.[22] Obviously, there is the victim of the sexual assault. But another person, Sarah Travis, also drank something that made her feel disoriented. And she was also present in the van, saw the assault and was then physically attacked by defendant's friend. From the circumstances, it is obvious that defendant and his friend targeted these minor girls for a sexual assault. And both were placed at risk during the assault.

The defendant and his friend got the girls drunk and/or drugged, and Sarah passed out on a snow bank. Defendant's actions affected Sarah because there was a concert of effort between the defendant and his friend (one purchased the alcohol and one furnished the van). They acted in concert in getting the girls drunk/drugged. Even after she was

[21] *People v Steele*, 283 Mich App 472, 490-491; 769 NW2d 256 (2009).
[22] MCL 777.39.

pushed out of the van, Sarah still faced other threats, including the continued threat of assault where her unconscious state made her even more susceptible to further unwanted sexual contact. Lying unconscious on a snow bank, Sarah was placed in danger of physical injury (i.e., frostbite and hypothermia). The concerted actions of defendant and his friend all occurred during the same criminal transaction.[23]

Defendant argues that because Sarah was not a victim of criminal sexual conduct, that she is not a victim for purposes of OV 9. But the plain language of the statute contradicts that argument: "Count each person who was placed in danger of physical injury or loss of life ... as a victim."[23] As the Court of Appeals emphasized in *People v Waclawski*, the scoring of OV 9 is not limited by who is an actual *victim* of the crime, but includes those who are present and placed at risk at the time the crime is committed.[24] Defendant's conduct placed Sarah at risk of injury and the court properly scored OV 9. Thus, not only did *some* evidence support the scoring, trial counsel would have been justified in that he would lose a scoring objection and in making the tactical decision not to object and litigate the issue.

The Court of Appeals ruled in defendant's favor: "Here, defendant correctly argues that the only victim placed in danger of physical injury during the sexual assault was the victim herself. Accordingly, the trial court erroneously scored ten points under OV 9."[24] Nevertheless, resentencing is not required because subtracting the 10 points

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[23] In *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008), the Justices wrote: ". . . only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered."
[23] MCL 777.39(2)(a).
[24] *See People v Waclawski*, 286 Mich App 634, 682-684; 780 NW2d 321 (2009).
[24] *People v Gordon Benjamin Wilding*, unpublished per curiam opinion of the Court of Appeals, attached as **Exhibit A,** Slip Op, p 3.

scored under OV 9 reduced defendant's total OV score from 60 to 50, and the reduction would not change defendant's OV level and sentencing guidelines range of 51 to 85 months.[25]

5. Offense Variable 10

Fifteen points were scored for predatory conduct in offense variable 10.[25] As described elsewhere in this brief, as well as defendant's own description of the circumstances in his brief, defendant and his friend provided alcohol to two minor girls to facilitate a sexual attack. As the Court of Appeals held recently in *People v Lockett*, providing alcohol to young girls provides a sufficient basis to score OV 10 for predatory conduct.[26] Frankly, the circumstances support the inference that they gave these girls something much more sinister than just alcohol, i.e., some type of a drug to make it easier to accomplish their sexual objectives. The *Lockett* Court,[26] held:

> Lockett also argues that the trial court incorrectly assessed 15 points for OV 10. OV 10 addresses the exploitation of a vulnerable victim. MCL 777.40. The court must assess 15 points when "[p]redatory conduct was involved [.]" MCL 777.40(1)(a). "Predatory conduct" means conduct that occurred before the commission of the offense and that was directed at the victim for the primary purpose of victimization. MCL 777.40(3)(a); *People v Cannon*, 481 Mich 152, 160-161; 749 NW2d 257 (2008).
>
> Evidence on the record supports the trial court's decision to assess Lockett 15 points for OV 10. Lockett picked up J. in the middle of the night in his van. Lockett drove to a liquor store to purchase alcohol. He then drove the van to a city park and parked it. Because of J.'s young age, she was susceptible to injury, physical restraint, or temptation. Moreover, given Lockett's actions that night, it is a reasonable inference that

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[25] *People v Gordon Benjamin Wilding*, unpublished per curiam opinion of the Court of Appeals, attached as **Exhibit A,** Slip Op, pp 3-4.
[25] MCL 777.40.
[26] *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012) ("A scoring decision is not clearly erroneous if the record contains '*any* evidence supporting the decision.'").
[26] *Lockett*, *supra* at 183-184.

victimization was his primary purpose for engaging in the preoffense conduct. The trial court correctly scored OV 10.

Defendant Wilding and his friend, working in concert, furnished a van and purchased alcohol to lower the inhibitions of two young women who, because of their age and inebriation, were susceptible to injury, physical restraint, or temptation. Circumstantial evidence and inferences arising from that evidence indicate that the girls were given something more sinister to drink than mere alcohol. Their physical reactions indicate they may have been drugged. Given the concerted actions of defendant and his friend that night, victimization appeared to be the primary purpose for their pre-offense conduct.

Thus, not only did *some* evidence support the scoring, trial counsel would have been justified in that he would lose a scoring objection and in making the tactical decision not to object and litigate the issue.[28] The record evidence, which the trial court is permitted to consider when calculating sentencing guidelines, includes the contents of the presentence investigation report.[27] A scoring decision is not clearly erroneous if the record contains any evidence in support of the decision.[28]

Resentencing before a different judge. A criminal defendant is entitled to a "neutral and detached magistrate."[29] A defendant claiming judicial bias must overcome

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[28] Defendant appears to concede that OV 10 could be properly scored at least five points for exploiting the victim through her intoxication, Defendant's Brief at 19-20. Scoring at least five points for OV 10, assuming that there was no error in the scoring of the other variables, would not result in a change in the applicable sentencing grid, and thus Defendant would not be entitled to resentencing under *Francisco*.

[27] *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008).

[28] *People v Lockett*, 295 Mich App at 182.

[29] *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011).

"a heavy presumption of judicial impartiality."[30] A judge's rulings, as well as his opinions, are not themselves valid grounds for alleging bias "unless there is a deep-seated favoritism or antagonism such that the exercise of fair judgment is impossible."[31] Defendant's reliance on Judge Reader's negative comments regarding defendant's past juvenile record and lack of rehabilitative potential does not establish support for his claim of judicial bias. The court's opinions do not reflect a deep-seated antagonism to the extent that the exercise of fair judgment was not possible. Comments that are critical of, or hostile to, counsel and the parties are generally not sufficient to pierce the veil of impartiality.[32]

II

Ripeness prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." Where enforcement efforts have not yet commenced and defendant has not yet sought to avail himself of the protections provided by the statute, defendant's claim is premature, i.e., not ripe for adjudication.

Standard of Review: Constitutional questions are reviewed de novo.[33]

Issue Preservation: Defendant raised this issue in his application for leave to appeal filed in the Michigan Court of Appeals.

Analysis: Defendant challenges the constitutionality of MCL 600.4803. The statute is a broad one that applies to all persons in criminal as well as certain civil proceedings.[34] Moreover, it provides for delayed or installment payments, as well as

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[30] *Id*, at 598, citing *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).
[31] *Jackson, supra* at 598, quoting *Wells, supra* at 391.
[32] *Jackson, supra* at 598, citing *Wells, supra* at 391.
[33] *People v Boomer*, 250 Mich App 534, 538; 655 NW2d 255 (2002).
[34] MCL 600.4801.

waiver of the late fee on request.[35] The statute is one of general application that does not discriminate among classes of persons or debts. Finally, the order is enforced "in the same manner as a civil judgment for money."[36]

The fact that a statute may appear undesirable, unfair, unjust, or inhumane does not of itself render a statute unconstitutional and empower a court to override the Legislature.[37] The Legislature, not the courts, should address arguments that a statute is unwise or results in bad policy.[38]

Because enforcement efforts have not yet commenced and defendant has not yet sought to avail himself of the protections provided by the statute, defendant's claim is premature, i.e., not ripe for adjudication. The doctrine of ripeness is intended to avoid premature adjudication.[39] A final decision is necessary for evaluating the claim that is before the reviewing court.[40] Ripeness prevents the adjudication of hypothetical or contingent claims before an actual injury has been sustained. A claim is not ripe if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all."[41]

A. The Court Costs Should Not Be Vacated.

At defendant's probation revocation sentencing, the trial court ordered $68.00 in state costs, and $130.00 in crime victims' fees. The other costs and assessments

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[35] MCL 600.4803(1).
[36] MCL 600.4805(2).
[37] *Boomer, supra* at 538.
[38] *Boomer, supra* at 538.
[39] *Hendee v Putnam Twp*, 486 Mich 556, 579; 786 NW2d 521 (2010).
[40] *Id*, at 579-580.
[41] *Michigan Chiropractic Council v Commissioner of Office of Financial and Insurance Services*, 475 Mich 363; 716 NW2d 561 (2006), quoting *Thomas v Union Carbide Agricultural Products Co*, 473 US 568, 580-581; 105 S Ct 3325; 87 L Ed 2d 409 (1985).

originally ordered will carry forward on the judgment of sentence.[42] Originally, the trial court ordered $68.00 in state costs; $60.00 in crime victim's fee; $1,800.00 in court costs; and repayment of the court-appointed attorney fee.[43]

A trial court may impose a generally reasonable amount of court costs under MCL 769.1k(1)(b)(ii) without the necessity of separately calculating the costs involved in the particular case.[44] The Michigan Legislature takes a "flat fee" approach to costs.[45] Had the Legislature wanted to require a precise determination of costs, it could have certainly required it in the statute. The Legislature seems to have endorsed a "reasonable flat fee" approach that does not require precision.[46] The Court of Appeals remanded for an evidentiary hearing in *People v Sanders*:

> Accordingly, while we conclude that the costs imposed in this case were authorized by statute, we remand this matter to the trial court to conduct a hearing to establish the factual basis for the use of the $1,000 figure, or to alter that figure as the established factual basis may necessitate. While defendant is to be afforded the opportunity to challenge the reasonableness of the costs figure, we reiterate that the costs figure does not need to be particularized in each individual case, and it is not the purpose of this hearing on remand to do so in this case. Rather, the purpose of this hearing is to factually establish the reasonable costs figure for felony cases in the Berrien Circuit Court, while affording defendant the opportunity to challenge that determination.[47]

Following remand to the Berrien County Circuit Court (which conducted the hearing as directed and received evidence of the cost of processing a felony case), the trial court considered the financial data submitted by the county, and determined that the average cost of handling a felony case was, conservatively, $2,237.55 a case and,

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[42] PRSt-8.
[43] St-8.
[44] *People v Sanders*, 296 Mich App 710, 715; 825 NW2d 87 (2012).
[45] *People v Sanders*, 296 Mich App at 714.
[46] *People v Sanders,* 296 Mich App at 715.
[47] *People v Sanders,* 296 Mich App at 715-716.

potentially, cases could cost as much as $4,846.00 each.[48] The trial court concluded that, because even the most conservative estimate of the cost of processing a felony far exceeded the $1,000.00 amount of costs imposed, there was "a reasonable relationship between the costs imposed and the actual costs incurred by the trial court."[49]

Defendant's argument in the trial court against the trial court's determination appears primarily to have been a continued objection to the trial court's failure to assess costs on the basis of the actual expenditure of time and money in a particular case. Defendant, in particular, argued for recognition of the distinction between the time invested in resolving a case by a plea and the time invested in conducting a trial, or, for that matter, between the time involved in a one-day trial and that involved in a three-day trial. But, as the trial court observed in its opinion, defendant was repeating an argument that the Court of Appeals had already rejected in its earlier opinion: that the costs imposed have to be particularized to the case before the court.[50] The Court of Appeals reiterated its original position that ". . . a trial court may impose costs 'without the necessity of separately calculating the costs involved in the particular case' (footnote omitted) and that is true whether a case is quickly resolved by a plea or at the conclusion of a lengthy trial."[51]

Following remand, the *Sanders* Court wrote that it ". . . would be hesitant to uphold an approach that would take into account whether the case was resolved by a plea or by a trial. If we embraced defendant's argument that costs should be less in a case resolved by a plea that only took '25 minutes of court time' rather than by a trial, there

[48] *People v Sanders*, 298 Mich App 105, 107; 825 NW2d 376 (2012).
[49] *People v Sanders*, 298 Mich App at 107.
[50] *People v Sanders*, 298 Mich App at 107.
[51] *People v Sanders*, 298 Mich App at 107.

would be a realistic concern that we would be penalizing a defendant for going to trial rather than pleading guilty. That is, a system where greater costs were imposed on a defendant who went to trial rather than plead guilty or nolo contendere would create a financial incentive for a defendant to plead rather than face the possibility of even greater court costs being imposed for exercising his or her constitutional right to a trial."[52]

The *Sanders* Court expressed satisfaction that the trial court complied with its directives on remand and did establish a factual basis to conclude that $1,000.00 in court costs under MCL 769.1k(1)(b)(ii) is a reasonable amount in a felony case conducted in the Berrien Circuit Court.[53]

In light of the Berrien County Circuit Court hearing on court costs, arguably it is unnecessary to remand for an evidentiary hearing to determine how Livingston County Circuit Court costs were calculated. Where the average cost of handling a Berrien County felony was, conservatively, $2,237.55 a case and, potentially, as much as $4,846.00 each,[54] the Circuit Judge's imposing court costs of $1,800.00 in Livingston County appears to be a bargain. A remand for an evidentiary hearing would only serve to support the People's position regarding the amount of court costs.

B. The Attorney Fees Should Be Affirmed.

Under MCR 6.005(C), if a defendant is able to pay part of the cost of a lawyer, the court may require contribution to the cost of providing a lawyer and may establish a plan for collecting the contribution. Michigan Case law provides support. In *People v*

[52] *People v Sanders*, 298 Mich App at 108.
[53] *People v Sanders*, 298 Mich App at 108.
[54] *People v Sanders*, 298 Mich App at 107.

Nowicki,[55] the Court held that a defendant may be required to reimburse the county for the cost of his court-appointed attorney.

In *People v Jackson*,[56] the Michigan Supreme Court held: "Thus, we conclude that *Dunbar* was incorrect to the extent that it held that criminal defendants have a constitutional right to an assessment of their ability to pay before the imposition of a fee for a court-appointed attorney. With no constitutional mandate, *Dunbar*'s presentence ability-to-pay rule must yield to the Legislature's contrary intent that no such analysis is required at sentencing."

When a defendant is statutorily entitled to an ability-to-pay assessment, that assessment is not required when the fee or cost is imposed; instead, that assessment is only required at the time payment is required, i.e., when the imposition is enforced. Hence, for purposes of an ability-to-pay analysis, the Justices have recognized a substantive different between the imposition of a fee and the enforcement of that imposition.[57]

In most cases, challenges to the reimbursement order will be premature if the defendant has not been required to commence repayment.[58] While some cases may require a formal hearing for this analysis, others clearly will not. In either situation, the trial courts must exercise sound discretion in fairly and properly adjudicating a defendant's challenge to his ability to pay.[59]

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[55] *People v Nowicki*, 213 Mich App 383, 388; 539 NW2d 590 (1995).
[56] *People v Jackson*, 483 Mich 271, 290; 769 NW2d 630 (2009).
[57] *People v Jackson, supra* at 291-292.
[58] *People v Jackson, supra* at 292 n 19.
[59] *Id*, n 20.

When a prisoner has had a fee for a court-appointed attorney imposed on him, MCL 769.1*l* allows a trial court to order the Department of Corrections to "deduct 50% of the funds received by the prisoner in a month over $50.00 and promptly forward a payment to the court as provided in the order when the amount exceeds $100.00 . . . ." Although this procedure is an enforcement of the fee without an ability-to-pay assessment, the *Jackson* Court declined to hold that this enforcement procedure was unconstitutional because the statute's monetary calculations necessarily conduct a preliminary, general ability-to-pay assessment before the prisoner's funds are taken.[60]

The ability-to-pay analysis should not be confused with the underlying constitutional tenet; it is merely a procedure used to ensure compliance with the constitutional precept that no indigent defendant must be forced to pay. In other words, as long as it does not require indigent defendants to pay a fee, a procedure that enforces the fee is not unconstitutional simply because it does not require an ability-to-pay analysis. Indeed, the true issue is always indigency, no matter what test is used to evaluate the issue. And application of § 1 *l's* calculative procedure necessarily only applies to prisoners who have an apparent ability to pay.[61]

MCL 769.1*l* inherently calculates a prisoner's general ability to pay and, in effect, creates a statutory presumption of nonindigency. The provision only allows the garnishment of a prisoner's account if the balance exceeds $50.00. Although this amount would be insufficient to sustain a defendant living among the general populace, it is uncontested that a prisoner's "living expenses" are nil, as the prisoner is clothed, sheltered, fed, and has all his medical needs provided by the state. The funds left to the

[60] *Jackson, supra* at 294-295.
[61] *Jackson, supra* at 295.

prisoner on a monthly basis are more than adequate to cover the prisoner's other minimal expenses and obligations without causing manifest hardship. Thus, the Justices concluded that § 1 *l's* application makes a legitimate presumption that the prisoner is not indigent.[62]

The Michigan Supreme Court acknowledged that one's indigency is an individualized assessment and that § 1 *l's* presumption does not result from a full individualized analysis of a prisoner's indigency. Accordingly, if a prisoner believes that his unique individual financial circumstances rebut § 1 *l's* presumption of nonindigency, he may petition the court to reduce or eliminate the amount that the remittance order requires him to pay. However, because courts adjudge a prisoner's indigency at the time of enforcement on the basis of manifest hardship and because a prisoner is being provided all significant life necessities by the state, the Justices cautioned that the imprisoned defendant bears a heavy burden of establishing his extraordinary financial circumstances. While the Justices did not attempt to lay out an extensive formal structure by which trial courts are to review these claims, the High Court did direct that trial judges be guided by MCL 771.3(6)(b), which controls the similar situation in which a probationer seeks remission of costs owed.[63]

Specifically, when reviewing a prisoner's claim, lower courts must receive the prisoner's petition and any proofs of his unique and extraordinary financial circumstances. Further, the lower courts should only hold that a prisoner's individual circumstances warrant amending or reducing the remittance order when, in its discretion, it determines that enforcement would work a manifest hardship on the prisoner or his

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[62] *Jackson, supra* at 295.
[63] *Jackson, supra* at 296.

immediate family. The trial courts are under no obligation to hold any formal proceedings. They are only required to amend the remittance order when § 1 *l's* presumption of nonindigency is rebutted with evidence that enforcement would impose a manifest hardship on the prisoner or his immediate family. Beyond these basic parameters, we leave it to the trial courts, in their sound discretion, to decide how to adjudicate a prisoner's claim that his individual circumstances rebut § 1 *l's* presumption of nonindigency. *Jackson, supra* at 296-297.

C. The Late Fee is Authorized by Statute

Section 4803(1) reads:

> A person who fails to pay a penalty, fee, or costs in full within 56 days after that amount is due and owing is subject to a late penalty equal to 20% of the amount owed. The court shall inform a person subject to a penalty, fee, or costs that the late penalty will be applied to any amount that continues to be unpaid 56 days after the amount is due and owing. Penalties, fees, and costs are due and owing at the time they are ordered unless the court directs otherwise. The court shall order a specific date on which the penalties, fees, and costs are due and owing. If the court authorizes delayed or installment payments of a penalty, fee, or costs, the court shall inform the person of the date on which, or time schedule under which, the penalty, fee, or costs, or portion of the penalty, fee, or costs, will be due and owing. A late penalty may be waived by the court upon the request of the person subject to the late penalty.

MCL 600.4803(1) clearly allows imposition of this 20 percent late fee on outstanding balances of fees that the trial court imposed on a defendant, which includes the fee for a court-appointed attorney. The *Jackson* Court declined to answer this question because the trial court did not impose this late fee on defendant, and there is no indication that it ever will.[64] The same can be said in defendant Wilding's case. Thus, at this point, the issue is not ripe.

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[64] *Jackson, supra* at 297-298.

III

Had defendant engaged in an objection to five offense variables, as he now does, that tactic would have shifted the focus of the sentencing away from the reasons the court should grant defendant YTA status to the aggravated factors that were scored in the guidelines. As in *Johnson*, as an objective matter, defense counsel could have easily concluded that such a course of action would be counterproductive. Defendant cannot overcome the presumption of trial strategy.

Standard of Review: Whether an attorney failed to provide effective assistance of counsel is a mixed question of fact and constitutional law.[65]

Issue Preservation: This Court reviews unpreserved claims of ineffective assistance of counsel for errors apparent on the record.[66]

Analysis: As the Court of Appeals observed in *People v Johnson*, the decision *not* to object to the scoring of the guidelines may have been trial strategy.[67] It is apparent from a review of the sentencing transcript that defendant's sentencing objective was to obtain continuation of Defendant's YTA status, which would have eliminated any impact of the scoring of the guidelines. But had defendant instead engaged in an objection to every single offense variable, as he now does, that tactic would have shifted the focus of the sentencing away from the reasons the court should grant defendant mercy to the aggravated factors that were scored in the guidelines. Just as in *Johnson*, as an objective matter, defense counsel could have easily concluded that such a course of action would be counterproductive. Defendant cannot overcome the presumption of trial strategy.[68]

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[65] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).
[66] *People v Johnson*, 293 Mich App 79, 90; 808 NW2d 815 (2011).
[67] *People v Johnson*, 293 Mich App at 91-92.
[68] "There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *Johnson, supra* at 90, noting *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Moreover, given the facts of this case, defense counsel also could have easily concluded that a scoring objection would be overruled.[69] So long as there is *any* evidence to support a particular scoring by the trial court, the scoring decision must be upheld.[70] An attorney's professional judgment that the trial court would not have granted any relief is insufficient to establish that trial counsel's conduct fell below an objective standard of reasonableness and overcome the presumption of effective assistance of counsel.[71]

In *Knowles v Mirzayance*,[72] the United States Supreme Court assessed an ineffective assistance claim alleging that an attorney improperly abandoned a claim of insanity. The argument presented by the defendant on appeal was that the claim should have been pursued because he had "nothing to lose."[73] Observing that trial counsel is not required to pursue every nonfrivolous defense, the Supreme Court rejected that argument concluding that "[c]ounsel ... is not required to have a tactical reason - above and beyond a reasonable appraisal of a claim's dismal prospects for success - for recommending that a weak claim be dropped altogether."[74] Thus, to the extent trial counsel could have concluded that objecting to the guidelines scoring would have been unsuccessful, that professional judgment is unassailable.

As the United States Supreme Court recently emphasized in *Premo v Moore*,[75] defendant must allege and establish that "no competent attorney would think [such] a

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[69] [2]That the scoring objections are *not* such slam-dunk winners are illustrated by the lengthy argument and resort to unpublished opinions that Defendant now relies to support his arguments.

[70] *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003)(emphasis in original).

[71] *See, e.g., People v Rose*, 289 Mich App 499, 527; 808 NW2d 301 (2010).

[72] *Knowles v Mirzayance*, 556 US 111; 129 S Ct 1411; 173 L Ed 2d 251 (2009).

[73] *Id.*, 129 S Ct at 1419.

[74] *Id.* at 1422.

[75] *Premo v Moore*, 562 US ___; 131 S Ct 733, 741; 178 L Ed 2d 649 (2011).

motion ... would have failed."[76] Thus, given the presumption of effective assistance, defendant must establish that *no* reasonable attorney would have rejected making the objections Wilding now claims should have been made. At the very least, the objections are arguable, and a reasonable defense attorney could have made the judgment that a scoring objection would be overruled. *That* judgment, just as the decision about the best way to try to obtain a continuation of Defendant's YTA status, is entitled to the presumption of trial strategy.

Finally, even assuming that Wilding could overcome the extremely high hurdle of an ineffective assistance challenge, defendant must still establish scoring errors that would result in a change in the applicable sentencing grid. In *People v Francisco*,[77] the Supreme Court emphasized that resentencing is necessary *only* where a scoring error changes the applicable guidelines grid. In order to result in a change in the applicable sentencing grid, Wilding must successfully reduce the total offense variable points by more than 10, from its presently scored 60 offense variable points to 49 points or less, in order to move defendant from a C-V grid (51-85 months) to a C-IV grid (45-75 months).[78] Thus, unless the trial court erred in scoring 11 or more offense variable points, defendant would not be entitled to resentencing.

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[76] *Id.*, 131 S Ct at 741.
[77] *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006)("Where a scoring error does not alter the appropriate guidelines range, resentencing is not required.").
[78] MCL 777.63.

Request for Relief

Based on the arguments, *supra*, we ask this Court to **deny** defendant's application for leave to appeal, and thus **affirm** the Court of Appeals' decision upholding defendant's conviction and sentence.

Respectfully Submitted,
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